(2)

No. 91-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a $72 per ton disposal fee upon such imported hazardous waste.

2. Does a $25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and Petitioner's commercial activity most often involves out-of-state hazardous waste.

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of the waste, violate the Commerce Clause.

RULE 29.1 STATEMENT

All parties to this case in the Court below are listed in the caption.

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BRIEF IN OPPOSITION

STATEMENT

1. *The Emelle Facility.* In 1989, Petitioner's Emelle facility received 788,000 tons of hazardous waste, representing approximately 17% of all hazardous waste generated throughout the country and landfilled in the United States. Pet. App. 57a, 58a. This hazardous waste was transported to Emelle over the public highways in Alabama in approximately 40,000 truckloads. Pet. App. 62a. Without restrictions imposed by legislation, the quantities

were expected to continue to increase annually. Pet. App. 58a. Of the hazardous waste received and landfilled at Emelle, 85% to 90% was imported from other parts of the country. Pet. App. 58a.

2. *Risks to Health, Safety, Environment.* The hazardous wastes landfilled at Emelle are inherently dangerous to human health and safety and to the environment. Such wastes consist of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Pet. App. 59a. Landfilling is the least desirable means of hazardous waste disposal. Pet. App. 59a. These hazardous wastes are inherently dangerous in their transportation and movement into or from one place to another throughout the State. Pet. App. 62a. The risks are increased by the increased volumes. Pet. App. 62a.

3. *The Challenged Statute.* In 1990, the Alabama Legislature enacted the challenged statute, which seeks to encourage business and industry to develop technology to eliminate or reduce the generation and landfilling of hazardous wastes and substances by imposing economic disincentives in the form of fees upon the commercial landfilling of such substances in Alabama and by limiting the annual volumes of such wastes which may be landfilled in future years. Equally important, the fees provide funds for the cost of maintenance, monitoring and eventual environmental cleanup.

4. *The Decisions below.* Following a four-day trial, and based upon the testimony at the trial as well as documentary evidence and testimony offered through thousands of pages of depositions, the trial court entered detailed findings of fact and conclusions of law. Pet. App. 50a-94a. The trial court concluded the Base Fee (the $25.60 per ton fee) and the Cap Provision (annual volume limitation) were valid, but held the Additional Fee (the $72.00 per ton fee applied only to imported waste) to be

violative of the Commerce Clause. The trial court's decision does not mention or attempt to distinguish this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), the case relied upon primarily by the State of Alabama below, in its analysis of the Additional Fee issue. The Alabama Supreme Court, based upon the findings of fact of the trial court and precedents of this Court, including and especially *Maine v. Taylor*, concluded the trial court's decision was in error on the Additional Fee issue and reversed the trial court on that issue while affirming the decision on the Base Fee and Cap Provision issues.

5. *Misstatement of Facts by Petitioner.* In accordance with the admonishment in Rule 15.1, Respondents are compelled to address a misstatement of the facts by Petitioner. Petitioner has referred to "over 3 million tons" of waste and cited statistics relating to quantities of hazardous wastes disposed of in Alabama, which statistics are highly misleading in the context in which they are used. The 1987 data relied on by Petitioner (Pet. at 5 n. 2) to support its claim that large amounts of Alabama-generated waste are disposed of noncommercially in Alabama and therefore not subject to the provisions of Act 90-326, is taken from the 1987 Calendar Year Hazardous Waste Biennial Report for the State of Alabama. Pl. Exh. 27.

Of the approximately 3 million tons of Alabama-generated waste covered by this report and referred to by Petitioner, about 80% was wastewater. Pl. Exh. 27 at 45. As indicated by Petitioner, approximately 690,000 tons of this wastewater was disposed of in surface impoundments in 1987. Pet. at 5 n. 2, citing Pl. Exh. 27 at 64. However, as is also indicated in Pl. Exh. 27 at 64, but not mentioned by Petitioner, this disposal ceased almost totally in 1987 when the generator of virtually all (99.7%) of this waste made process conversions which eliminated the generation of this waste. The remainder of the wastes which Petitioner erroneously states would

fall within the definition of "disposal" consisted primarily of wastewater which was *treated* in surface impoundments (1.7 million tons), along with some 71,000 tons of wastewater stored in surface impoundments while awaiting treatement and 162,000 tons of waste *stored* in waste piles awaiting treatment, recycling, disposal or other disposition. Pl. Exh. 27 at 45.

Contrary to Petitioner's statements (Pet. 5 and n. 2, 19) wastewater treatment is not "disposal," nor is it comparable in terms of environmental risk to Petitioner's landfilling activity. The temporary storage of waste prior to disposal is not "disposal" as contemplated by the Act. After subtracting from the 1987 figures upon which Petitioner relies the tons of wastewater treated in surface impoundment, the surface impoundment disposal which ceased in 1987, and waste in temporary storage, the total Alabama-generated waste shown by this report to fall within the definition of "disposal" in Act 90-326 consists of 52 tons of waste disposed of by land application, about 4,000 tons incinerated (Pl. Exh. 27, at 45), and about 37,000 tons landfilled, most of which was landfilled in Petitioner's facility. Pet. 5 n. 2.[1]

In 1989, the year preceding enactment of the challenged statute, Petitioner's facility received 68,000 to 69,000 tons of Alabama-generated waste and over 700,000 tons of out-of-state waste. Pet. App. 16a. The only hazardous waste landfill in the State other than Petitioner's facility is a relatively small noncommercial facility which landfills about 4,000 tons per year of on-site generated waste. Pet. App. 16a. This is the only noncommercial disposal in the State which is qualitatively comparable to

[1] These data include only wastes classified and regulated under the Resoruce Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). The data does not include toxic wastes regulated under other statutes or other dangerous industrial wastes landfilled at Petitioner's commercial facility. The trial court's findings, which include all such waste, show total volumes of waste landfilled at Petitioner's facility in recent years. See Pet. App. 57a.

Petitioner's disposal activities. Based on these figures, about 95% of the total in-state hazardous waste landfilled in Alabama is subject to Act 90-326.

SUMMARY OF ARGUMENT

The serious health, safety and environmental problems faced by the various states, and thus by the country, resulting from the generation and landfilling of hazardous waste, present significant political issues of emerging importance. Comprehensive legislation, not piecemeal judicial determination, will be needed to address these issues.

The record fully supports the trial court's findings that Alabama has a legitimate interest in guarding against the various health, safety and environmental risks posed by the transportation and landfilling of enormous quantities of inherently dangerous hazardous wastes. The Alabama Supreme Court correctly applied the legal principles announced in decisions in this Court, particularly *Maine v. Taylor*, 477 U.S. 131 (1986), to the specific findings of the trial court in this case in finding the Additional Fee does not violate the Commerce Clause. The decision does not conflict with the precedents of this Court.

The Base Fee and Cap Provisions apply evenhandedly to in-state and out-of-state wastes to effect legitimate local purposes. The trial court and the Alabama Supreme Court correctly applied principles announced in prior cases of this Court, particularly *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in upholding the Base Fee and Cap Provisions.

The issues giving rise to the dispute in this case will ultimately require resolution by Congress at the national level. There is no need for this Court to devote its resources to the issues of this case.

REASONS FOR DENYING THE PETITION

I. AT THE NATIONAL LEVEL, THE COUNTRY'S WASTE DISPOSAL PROBLEMS ARE MORE APPROPRIATE FOR RESOLUTION BY THE CONGRESS THAN BY THIS COURT.

It cannot be disputed that this country faces serious problems with respect to disposal of wastes, or that issues relating to waste disposal, including issues relating to the movement of waste from one state for disposal in another, are significant political issues of emerging importance.

Twenty-two states totally ban the commercial landfilling of any of the types of hazardous wastes involved in this case within their borders, refusing to accept to any degree the risks which Alabama seeks merely to limit and control. See R. 443, 444. These states have de facto bans against the importation of the out-of-state wastes by not permitting facilities for the landfilling of such wastes within the state. Some of these states have permitted on-site landfills for their own industry (see R. 457), but have not permitted commercial landfills. See R. 448. Other states will not accept any landfilling of such waste. See R. 448, 457.

Althouh hazardous waste landfills can be designed and engineered to operate in practically every state, only a few commercial sites exist. Pet. App. 57a. Public resistance, not a lack of technical feasibility or any value of commerce, is the reason for the existing levels of interstate shipment of wastes. Pet. App. 57a. See also R. 2278, TR. 126, 623. The present level of traffic in such waste is not due to the value of commerce in the waste, it is due instead to the fact that other states force it to be exported due to the negative value, the risk, of having it within the state.[2]

[2] Since November 17, 1980, the effective date of RCRA, only one additional hazardous waste landfill has been permitted in the United States. That facility, in Last Chance, Colorado, at the time of trial, had never opened or accepted waste and was for sale. Pet. App. 57a.

Addressing waste disposal problems at the national level by addressing the political tensions between states, some of which may actually need to export some wastes, some of which export waste due to public resistance to disposal within the state, and some of which are burdened with receiving large volumes of waste from other states, is the responsibility of Congress. These issues are policy issues in need of a comprehensive legislative solution by Congress, not constitutional issues in need of piecemeal judicial resolution by this Court.

The Court might clarify the constitutional rule in this case by affirming or reversing, but a decision by this Court either way will not resolve the policy issues relating to waste disposal. These policy issues, not the constitutional issues raised in this case, are the questions which have practical significance. Congress is the appropriate forum for reaching a political solution to these policy issues, a solution which can accommodate both waste disposal needs at the national level and the need to protect health, safety and the environment at the local level from the dangers associated with overwhelming volumes of imported wastes. A legislative compromise is needed to address the underlying problems.[3] The nation's waste

[3] Congress has undertaken such a comprehensive legislative solution with respect to the interstate movement of municipal solid waste. Legislation is pending which would specifically provide limited short-term protection for interstate movement of wastes while allowing higher fees to be levied on imported wastes, with the permissible differential increasing in the future, and specifically providing for states to ban the importation of such wastes and defining the circumstances under which such bans may be implemented. See The Resource Conservation and Recovery Act Amendments of 1991, S. 976, 102d Cong., 1st Sess., § 407. This comprehensive federal legislation on the subject would leave the dormant commerce clause issues in this case irrelevant with respect to wastes covered by the legislation. Most of the cases cited by Petitioner as pending in various courts (Pet. 17) involve wastes which would be covered and issues which would be rendered moot by this legislation. In addition, this legislation shows the type of

disposal problems will not be solved by elevating Petitioner's activity of moving problems from one place to another to the unique and unprecedented level of constitutional protection sought by Petitioner, nor will this Court solve the nation's waste disposal problems by reaffirming the constitutional principles stated and applied by this Court in *Maine v. Taylor* and followed by the Supreme Court of Alabama in this case.

If the problems giving rise to the dispute in this case require resolution at the national level, such resolution should be fashioned by Congress. Under these circumstances, there is no need for this Court to devote its resources to the issues of this case.

II. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE $72 ADDITIONAL FEE DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT. THE $72 PER TON DISINCENTIVE LEVIED ON THE DISPOSAL OF OUT-OF-STATE HAZARDOUS WASTE IN ALABAMA IS A LEGITIMATE EXERCISE OF THE STATE'S POLICE POWER TO LIMIT RISKS TO HEALTH, SAFETY, AND THE ENVIRONMENT.

The fundamental issue in dispute in this case involves the interpretation of this Court's decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Does that decision hold that the commerce clause forbids *all* state restrictions on the importation of wastes, regardless of the effects of the importation on the local community? Or may restrictions on the importation of wastes, like restrictions on the importation of any other item, be upheld where based on the protection of public health, safety, or the environment?

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creative, comprehensive legislative compromise needed to balance the needs and interests of the various states, and demonstrates the ability of the political processes in the legislative branch to fashion and implement such a comprehensive compromise solution.

Petitioner asks this Court to review and reverse the decision of the Supreme Court of Alabama and establish as a rule of constitutional law the following:

> If a state permits the disposal within its borders of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state, on the same terms and without limitations, unlimited volumes of all such noxious items from all other states, regardless of the risks thereby created to the health and safety of citizens of the recipient state and to its environment.

Petitioner argues that such a rule follows from this Court's decision in *Philadelphia v. New Jersey*. Petitioner's construction of *Philadelphia v. New Jersey* would place that case in direct conflict with every relevant decision of this Court before and since that decision.

It is clear that the majority opinion in *Philadelphia v. New Jersey* considered New Jersey's ban on out-of-state garbage to amount to simple economic protectionism, protecting New Jersey residents from out-of-state competition for landfill space. This Court has consistently characterizd *Philadelphia v. New Jersey* as a case involving economic protectionism, in contrast to environmental protection. For example, in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), this Court cited *Philadelphia v. New Jersey* as supplying the rule of decision where "a state law purporting to promote environmental purposes is in reality 'simple economic protectionism'." *Id.* at 471. In *Maine v. Taylor*, 477 U.S. 131 (1986), this Court cited *Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity'" while, in contrast to *Philadelphia v. New Jersey*, "there is little reason in

this case to believe that the legitimate justifications that the state has put forward for its statute are merely a sham or a 'post hoc rationalization'." *Maine v. Taylor*, 477 U.S. at 148-49. Again, in *Maine v. Taylor*, this Court used *Philadelphia v. New Jersey* as an example of a case *in contrast* to cases "where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a state's citizens or the integrity of its natural resources" to make the point that "[n]ot all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause 'is not a guarantee of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community'." *Maine v. Taylor*, 477 U.S. at 148 n.19 (quoting *Robertson v. California*, 328 U.S. 440, 458 (1946)).

The Supreme Court of Alabama correctly observed that this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment," citing *Maine v. Taylor*, 477 U.S. at 148 n.19 (1986). Pet. App. 41a. Although this Court made exactly such a distinction in *Maine v. Taylor*, Petitioner claims that this Court's decisions "expressly and conclusively reject the Alabama Supreme Court's 'distinction'." Pet. 12. To the contrary, as this Court has stated, "[t]his distinction between the power of the State to shelter its peop'e from menaces to their health or safety . . ., even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949).

Contrary to Petitioner's interpretation of the case, *Philadelphia v. New Jersey* does not eliminate this fundamental distinction and elevate wastes to a special and unique status under the Commerce Clause. *Philadelphia v. New Jersey* merely holds that state measures discriminating against out-of-state waste are subject to the same review under the Commerce Clause as state measures discriminating against other out-of-state items. But Petitioner's argument leaps from the result in *Philadelphia v. New Jersey* to the conclusion that any state restriction on the importation of waste must be held invalid, without regard to whether the case involves health, safety, or the environmental protection, or merely simple economic protectionism.[4]

Petitioner mischaracterizes the holding of the Eleventh Circuit in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Regulation* (*"NSWMA"*), 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S.Ct. 2800 (1991), in order to advance the argument that the decision below is in conflict with that Eleventh Circuit decision. The Eleventh Circuit did not hold that Alabama must accept unlimited volumes of out-of-state hazardous waste on the same terms as the State deals with its own such waste; instead, that court held that the State could not selectively ban waste from certain other states on the basis of state of origin rather than on the basis of the danger to the

[4] This Court rejected New Jersey's argument that its ban on out-of-state garbage was analogous to health-protective measures which this Court had repeatedly upheld, by distinguishing the quarantine cases as involving restrictions on articles whose "very movement risked contagion and other evils," from the ordinary garbage where there was "no claim here that the very movement of waste into or through New Jersey endangers health." *Philadelphia v. New Jersey*, 437 U.S. at 628-29. In contrast, the trial court in this case found that "[t]he hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama." Pet. App. 62a.

State of allowing such waste to be brought into the State. Dicta in the Eleventh Circuit opinion may indicate a somewhat different understanding of this Court's decision in *Philadelphia v. New Jersey* and a lack of appreciation of the principles enunciated by this Court in *Maine v. Taylor*. Nevertheless, the holding that the State may not single out wastes from specific states on the basis of which state the waste comes from is not in direct conflict with the holding of the Supreme Court of Alabama that the State may act to reduce the overall volume of such waste coming into the State on the basis of the dangers created by the importation of the waste.[5]

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[5] The other decisions of the courts of appeal cited by Petitioner are likewise not in direct conflict with the decision below. All of these decisions except the Eleventh Circuit decision discussed in the text pre-date this Court's decision in *Maine v. Taylor*. Two of these decisions involved state regulations which were preempted by congressional legislation governing disposal of radioactive wastes. *See Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). And *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978), which struck down a reciprocity statute, interpreted *Philadelphia v. New Jersey* in a manner consistent with and supportive of the decision below—"the Supreme Court concluded that the New Jersey statute was *purely an economic protectionist measure*." *Hardage*, 582 F.2d at 1266 (emphasis added).

Subsequent to the filing of the Petition, the Fourth Circuit has upheld a preliminary injunction against enforcement of South Carolina measures creating a mandatory preference for in-state waste and imposing selective limitations on waste imports from other states. *Hazardous Waste Treatment Council v. South Carolina*, slip op., No. 91-2317 (4th Cir. Sept. 20, 1991). The Fourth Circuit did not decide the merits of the case. The Alabama statute in this case, unlike the South Carolina statutes and regulations, does not reserve disposal capacity for in-state use and does not selectively target wastes based on which other state the waste comes from. Like the decision of the Eleventh Circuit in *NSWMA*, the Fourth Circuit opinion may indicate an interpretation of *Philadelphia v. New Jersey* which differs somewhat from that of the Alabama Supreme Court. However, to the extent that these decisions of the Fourth and Eleventh Circuits might be read as conflicting with the decision of the Supreme Court of Alabama in this case, the decisions would also conflict to the same extent with this Court's opinion in *Maine v. Taylor*.

The interpretation of the Commerce Clause advanced by Petitioner simply cannot be reconciled with this Court's decision in *Maine v. Taylor* and numerous earlier decisions of this Court recognizing the power of the states to regulate the importation in interstate commerce of items which pose threats to the health, safety or environment of the state.[6] It is illogical, and indeed ridiculous, to assert that while the Commerce Clause allows a state to restrict the importation of baitfish on the grounds that some of the imported baitfish *might* cause some disturbance in the aquatic ecology, the Commerce Clause requires states to suffer the importation of unlimited volumes of hazardous wastes. These wastes, without dispute, "are inherently dangerous to human health and safety and to the environment" and consist of "wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 11a.

The Supreme Court of Alabama correctly followed this Court's decision in *Maine v. Taylor*. Alabama has a legitimate purpose in seeking to reduce the large volume of highly dangerous waste materials being brought into

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[6] For examples, see *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Reid v. Colorado*, 187 U.S. 137 (1902); *Compagnie Francaise v. State Bd. of Health, Louisiana*, 186 U.S. 380 (1902); *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. 248 (1901); *Rasmussen v. Idaho*, 181 U.S. 198 (1901); *Louisiana v. Texas*, 176 U.S. 1 (1899); *Missouri, Kansas, & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Kimmish v. Ball*, 129 U.S. 217 (1889); *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878).

the state for burial. The $72.00 per ton economic disincentive advances this purpose by encouraging a reduction of the volume of such wastes being brought into the state.[7] The only imported wastes subject to the fee are dangerous wastes. Therefore, there are no less discriminatory alternatives, such as inspection or testing, to identify those wastes which are dangerous—only dangerous wastes become subject to the fee, because only those dangerous wastes are disposed of in commercial hazardous waste disposal facilities. There is no basis in this Court's decision for Petitioner's contention that the "available nondiscriminatory alternative" prong of the test requires that the State accept and dispose of out-of-state noxious items on the same terms which the State applies in dealing with its own such noxious items.[8] Alabama has a

[7] The use of an economic disincentive to influence and regulate behavior is not a novel idea, and is especially appropriate in the area of environmental regulation because it both allows for and forces a transition to alternatives while allowing the greatest flexibility in developing alternatives to the discouraged activity. For example, in sections 4861-62 of the *Internal Revenue Code*, Congress has implemented an economic disincentive in the form of an excise tax on ozone-depleting chemicals. The excise is scheduled to increase annually to ratchet up the disincentive, thereby increasing the incentive to find and use alternatives. Similarly, the "Gas Guzzler" excise tax in section 4064 of the *Internal Revenue Code* imposes a deterrent levy of up to $7,700 (as doubled in 1990) on cars failing to meet specified fuel economy standards. These measures, like the Additional Fee, are not designed primarily to produce revenue; the ultimate objective is that the environmental measures work and produce no revenue at all.

[8] In fact, this Court's decisions clearly show that how the state deals with problems already existent within the state is not determinative of how the state may deal with the importation of more such problems. For example, the First Circuit decision which this Court reversed in *Maine v. Taylor* would have struck down Maine's ban on the importation of baitfish in part because "Maine provides no protection against in-state parasites and related harms that may exist at large in in-state hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985). This Court did not find it relevant to discuss how Maine dealt with such problems within the state in reaching

reason, apart from the origin of the wastes, to limit importation of the wastes—they are wastes which are "inherently dangerous to human health and safety and to the environment." Pet. App. 11a. The decision below is in accord with this Court's decisions and does not warrant this Court's review.

III. THE BASE FEE OF $25.60 PER TON, IMPOSED EVENHANDEDLY ON THE COMMERCIAL LANDFILLING OF IN-STATE AND OUT-OF-STATE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE FACIALLY OR IN ITS PRACTICAL EFFECT.

The "commerce" upon which the Base Fee is levied is the *commercial* disposal of wastes. The Base Fee applies identically to this commerce, whether interstate or intrastate.

The Base Fee is a fee levied on operators of commercial facilities, based on the volume of business, without any distinction as to the origin of the business. The effect of the Base Fee falls equally on both in-state and out-of-state customers of a commercial facility. The Base Fee applies identically to Petitioner's transactions dealing with both in-state and out-of-state wastes. It does not discriminate against interstate commerce.

the conclusion that Maine could prevent the importation of more such problems, and dismissed as being of "little relevance" the fact that the fish which Maine did not allow to be imported could simply swim in from New Hampshire. *Maine v. Taylor*, 477 U.S. at 151. Earlier cases involving discrimination against out-of-state livestock considered alternatives—whether the measure sufficiently targeted only those animals posing the danger to be protected against without unnecessarily discriminating against healthy animals—but these cases did not compare the measures employed to deal with the out-of-state cattle to the measures employed by the state to deal with in-state sick animals. *See Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902); *Smith v. St. Louis & South Western R. Co.*, 181 U.S. 248 (1901); *Missouri, Kansas & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878).

Petitioner argues that the Base Fee discriminates against out-of-state waste in its practical effect, because it applies to Petitioner's commercial transactions but not to industries which manage their own wastes. Petitioner can point to no discrimination against interstate commerce, such as was present in the cases it cites.[9] Instead, Petitioner asserts that the State cannot levy any tax on its commercial activity of waste disposal because the State does not also levy the same tax on industries which manage their own wastes. Under Petitioner's illogical construction of the Commerce Clause, states would be precluded from taxing most commercial activities, if the commercial activity included interstate commerce, on the basis that residents of the state could engage in a similar activity noncommercially and thus be "exempted." [10]

[9] The cases relied upon by Petitioner in its attempt to fabricate the existence of a conflict or some confusion on this issue, Pet. 25-27, all dealt with economic favoritism for *commercial transactions* involving in-state products, with commercial transactions in out-of-state products receiving disfavorable treatment in comparison to identical commercial transactions in in-state products. None of these cases provide any support for Petitioner's argument that a tax may be found to discriminate against interstate commerce by falling equally on both interstate and intrastate commercial activity but "exempting" noncommercial activity, nor do these cases indicate any confusion on the part of lower courts or need for guidance by this Court.

[10] Petitioner fails to address the host of problems which would plague the application, as a rule of general applicability, of the Commerce Clause standard Petitioner seeks to have established. To what extent would a taxed commercial activity have to involve interstate commerce before the tax was considered to discriminate in practical effect? How much noncommercial activity would have to be "exempted"? Few commercial activities do not involve interstate commerce to some extent, and few taxes fall on noncommercial activity. Does the validity of "bed" taxes on commercial lodging accommodations turn on how often such taxes fall on out-of-state travelers? Although Petitioner might not concede the point, there appears to be no question that the State could levy a tax on Petitioner's commercial activity measuring volume of business by gross dollar receipts, which tax would not fall on noncommercial activity

Petitioner's argument is that the Base Fee discriminates against interstate commerce because the "exemption" of noncommercial activity "has the practical effect of shifting a disproportionate tax burden to interstate commerce." (Pet. 23.)[11] Like the out-of-state utilities challenging Montana's coal severance tax, "the gravamen of [Petitioner's] claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). Unlike those challenging the Montana tax, who were candid enough to "not suggest that this assertion is based on any of this Court's prior discriminatory tax cases," *id.*, Petitioner makes this assertion after this Court has clearly rejected it. *See id.* at 617-19.

Petitioner attempts to distinguish the cases relied upon by the courts below, claiming that the legislature has "exempted" in-state waste by applying the Base Fee only to commercial disposal. Petitioner does not even limit itself to arguing that the Base Fee does not apply to non-

because such noncommercial activity would generate no monetary receipts. Is measuring the volume of Petitioner's commercial activity in tons rather than dollars a distinction of constitutional significance? Does the constitutionality of a gross receipts tax depend upon what proportion of the receipts come from interstate commerce, and to what extent in-state residents may engage in similar transactions or activity noncommercially, thereby being exempted?

[11] The proportionality prong of this Court's four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), requires that a tax be "fairly related to the services provided by the state," *id.* at 279, and is satisfied if the tax is assessed in proportion to the taxpayer's activities or presence in the state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981). A state tax imposes a disproportionate burden on interstate commerce "when the measure of [the] tax bears no relationship to the taxpayer's presence or activities in a state." *Id.* at 629. It is difficult to imagine a tax more perfectly proportional to a taxpayer's commercial activity of burying waste in the ground than a per-ton fee on that very activity.

commercial activity *similar* to that in which Petitioner engages commercially—landfilling of waste. The statistics Petitioner uses in claiming that most in-state waste is not subject to the Base Fee consist almost entirely of millions of tons of waste water which is treated and cleaned up, and waste in storage. As discussed previously, these numbers are highly misleading in the context in which Petitioner uses them.[12]

If any comparison between Petitioner's commercial activity and other noncommercial activity were relevant, the proper comparison would be to similar activity. There is only one other hazardous waste landfill in the State, a noncommercial on-site facility handling about 4,000 tons per year. (Pet. App. 16a.) Aside from the company which owns that landfill and disposes of its own waste on-site, all in-state hazardous waste landfilled in Alabama is landfilled in Petitioner's facility and is subject to the Base Fee. With the sole exception of that one company which has its own small landfill, all in-state generators who landfill hazardous wastes in Alabama find 100% of their landfilled wastes subject to the Base Fee, and every Alabama waste generator who landfills waste in the State is affected in the exact same way as any out-of-state generator who landfills waste in Alabama. Petitioner has to resort to counting tons of water treated to attempt to support its claim that the Base Fee "exempts" in-state waste. Of the approximately 73,000 total tons of in-state waste landfilled in Alabama in 1989, about 69,000 tons were landfilled at Emelle, and about 4,000 tons at the on-site landfill. Pet. App. 16a. Based on these figures, about 95% of the in-state landfilled waste would be subject to the Base Fee.

The Legislative Findings show a concern about *increasing amounts* of hazardous waste being landfilled. See Ala. Code § 22-30B-1.1, Pet. App. 102a-104a. The one noncommercial landfill is used by one company which gen-

[12] See Misstatement of Facts by Petitioner, *supra* at 3.

erates waste at the rate of about 4,000 tons per year. Pet. App. 16a. At Petitioner's landfill, on the other hand, volume has increased dramatically in recent years, reaching 788,000 tons in 1989 (Pet. App. 9a), on average more waste in two days than the noncommercial landfill handles in an entire year. There is no *comparable* facility or activity in the State not subject to the Base Fee.

Even if it were factually correct that any significant amount of comparable noncommercial activity was not subject to the Base Fee, there is absolutely no legal support for Petitioner's argument that a tax which applies equally to interstate and intrastate commercial activity violates the Commerce Clause by not also applying to noncommercial activity.

Recognizing the regulatory function of the Base Fee in evenhandedly deterring Petitioner's large-volume hazardous waste landfilling, the courts below applied the principles set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and upheld the Base Fee. The decision below is based on and in accord with settled law and there is no reason for review by this Court.

IV. THE CAP PROVISION, WHICH LIMITS FUTURE GROWTH IN THE ANNUAL VOLUMES OF LANDFILLED HAZARDOUS WASTE AND APPLIES EVENHANDEDLY REGARDLESS OF THE ORIGIN OF THE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE.

Like the Base Fee provision, the Cap Provision is not facially discriminatory. It provides that no commercial facility which takes in more than 100,000 tons of hazardous waste annually may dispose of more waste in the year starting October 1, 1991, than it disposed of during the statutory benchmark period, regardless of the origin of the waste. Petitioner's basic position is that Petitioner, and not the Alabama legislature, has the power to determine what volume of hazardous waste will be buried in

the State, and that the Cap Provision, like the fees, is an impermissible legislative interference with Petitioner's rights to leave Alabama holding whatever amount of such waste Petitioner wishes to bury in the State.

Like the Base Fee, the Cap Provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, have not been held to violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 401 S.E.2d 227 (W. Va. 1990). The Fourth Circuit has observed that "South Carolina may preserve the [disposal] capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved." *Hazardous Waste Treatment Council*, slip op. at 21. And the Eleventh Circuit has upheld a preliminary injunction against enforcement of a complete ban on imported waste on the grounds that the county involved could have achieved its goals with a lesser burden on interstate commerce, by imposing "*tonnage limits* on *imported waste*" or by auctioning permits for disposal of "*fixed amounts of imported waste.*" *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 945 (11th Cir. 1991) (emphasis added).[13]

The courts below found that the State has a clear and legitimate interest in conserving and protecting its natural resources and environment and protecting the health and safety of its citizens. The Cap Provision promotes these interests without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. The Cap Provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the State's highways and to its landfills.[14]

The Court should note that landfilling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. *See* 42 U.S.C.A. § 6901(b)(7); 6902. The Cap Provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste landfilling, and, as the courts below determined, "furthers the policy

[13] *See also County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D.Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991) (holding, in a case brought by the operator of a private commercial landfill which was completely prohibited from landfilling out-of-state waste, that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills).

[14] With respect to the dangers involved in the transportation of the wastes involved in this case, the trial court found as follows:

> 17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment.
>
> Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

Pet. App. 62a.

that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use" of safer alternatives. Pet. App. 28a.

Petitioner's argument that the Cap discriminates against interstate commerce rests solely on the existence of a provision allowing the State to respond to an emergency or to comply with federal law, and on the fact that most of the tremendous and rapidly increasing volumes of dangerous wastes being buried at Petitioner's landfill, concern over which prompted the Cap, are wastes brought into the State from elsewhere. There is no basis for Petitioner's contention that an otherwise valid, evenhanded regulation must be considered discriminatory simply because the regulation provides for some flexibility in response to an emergency situation. Nor is there any basis for Petitioner's contention that an evenhanded legislative response to a problem must be found to discriminate against interstate commerce simply because the largest contribution to the problem originates outside the State. The courts below correctly followed this Court's decision in *Pike v. Bruce Church, Inc.* Accordingly, there is no reason for this Court to review the decision below on this issue.

CONCLUSION

Twenty-two states totally ban the commercial landfilling of hazardous wastes. These "de facto" bans result from these states having simply refused to issue a permit for any landfill facility. Alabama, on the other hand, was receiving such large and rapidly increasing volumes of waste that by 1989, it was receiving 17% of the hazardous wastes generated throughout the country for landfilling. The present and ever increasing risk to the health, safety and environment of Alabama justify the economic disincentive measures and Cap Provision measure employed by Alabama to deal with the substantial risks inherent in such large quantities of hazardous waste.

The Commerce Clause does not elevate free trade above all other values. This Court should not establish, as urged

by Petitioner, a rule of constitutional law that if a state permits the disposal within its state of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state of unlimited volumes of noxious items from all other states, regardless of the increased risk thereby created to the health and safety of the citizens of the state and to the environment.

The Base Fee and the tonnage restrictions in the Cap Provision apply evenhandedly to in-state and out-of-state wastes in order to effectuate a legitimate local interest.

The issues raised by Petitioner in the action below and in this Court give rise to matters that should be addressed at the national level by Congress. Such issues should not be dealt with in a piecemeal manner by the courts.

There being no conflict between the Alabama Supreme Court's decision and the precedents of this Court, there is no need for this Court to devote its resources to the issues Petitioner desires to have presented in this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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